

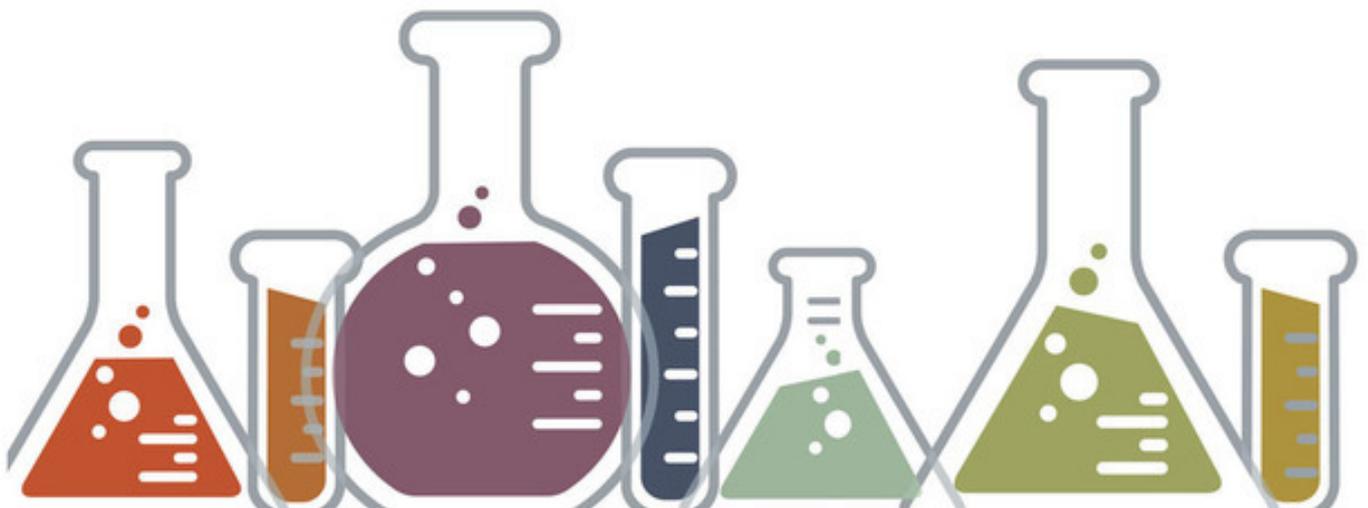
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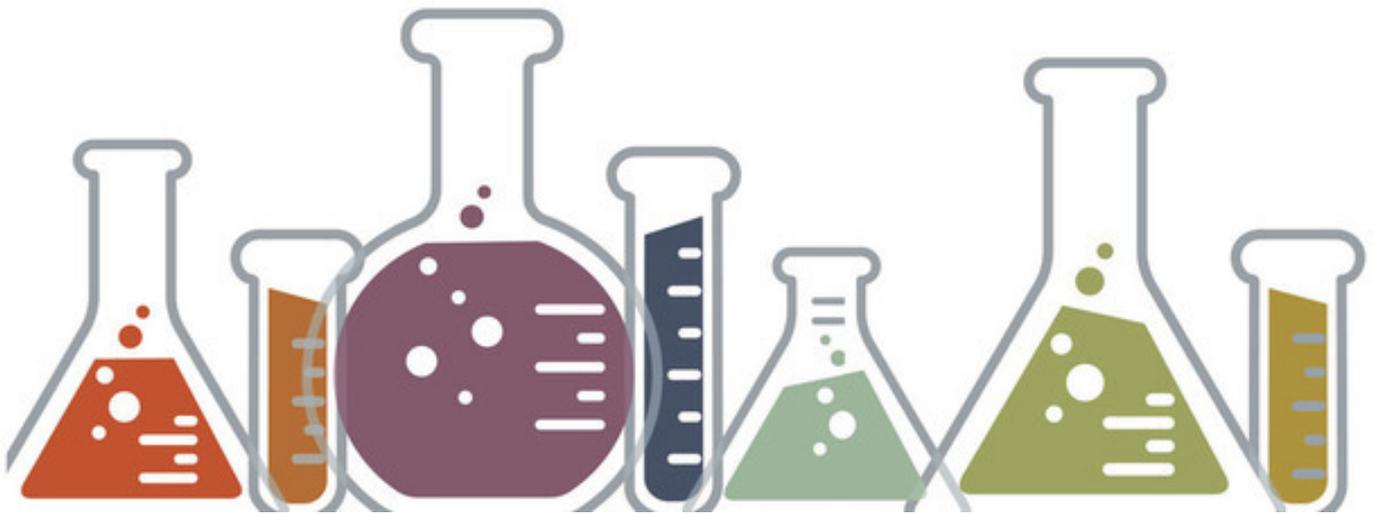
# CORPORATE COUNSEL *NOW*

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## **Creating Legal Chemistry: Making Diversity Part of Your In-House Legal Strategy**

### **Cultural Competence**





## CHEAT SHEET

- **Buy-in.** Creating a sustainable diversity program requires the buy-in of the company and the leading legal officers.
- **ABA Resolution 113.** Use the ABA Resolution 113 to draft goals for a legal diversity committee. The resolution urges legal service providers to expand and create opportunities for diverse attorneys and to direct a greater percentage of purchased legal services to diverse attorneys.
- **Diversity pays.** A law firm ranked in the top quartile in diversity can generate more than US\$100,000 of additional profit per partner than a peer firm of the same qualifications but ranked in the low quartile in diversity.
- **Mansfield Rule.** The Mansfield Rule requires law firms and companies to consider women and attorneys of color as at least 30 percent of the candidate pool for promotion and leadership positions.

All movements begin with a single motion; all momentum is the result of continual and advancing movement. Corporate in-house legal departments, including that at BASF Corp., are acknowledging these realities and setting out to change the internal and external view of diversity in the legal profession.

While many companies have had established diversity programs for some time, in-house legal departments have a long way to go to match the populations they serve. Over the past decade or so, in-house law departments have sought to change this. They do so while faced with the reality of glacial advancement for diversity globally, and specifically as it relates to the legal culture in the United States. Thus, this article is meant to provide some context to these issues and to provide guidance on some best practices for creating and continuing an in-house legal diversity program. The BASF Corp. in-house legal program will serve as a case study for this initiative.

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## **What is diversity?**

An interesting question is when the word “diversity” began to appear in common legal parlance — separate from its jurisdictional definition. A LexisNexis Advance search of the term “diversity” — excluding the term “jurisdiction”— shows three distinct upswings starting in the years 1960, 1980, and 2007. If you do a Boolean search for “diversity” and “race,” but exclude the term “citizenship,” you will notice a steep upward citation trend since approximately 1964. These are largely anecdotal, unscientific results, and one may question the importance of using the term “diversity” to ascertain when inclusion began to move from the occipital to the frontal lobe of the human brain (for rhetorical use rather than proof of what part of the brain processes diversity), but few can doubt its current and continued importance in society and in legal circles.

No one court or no one person has ever arrived at a widely-accepted and adopted definition of diversity; nor has anyone accurately defined what its end goals are or when/if it can be achieved. Therefore, if judged quantitatively, corporations, law firms, and courts have essentially been charged with hitting a floating bullseye with a dull-tipped dart.

However, when the US Supreme Court first substantively addressed diversity in the schools, Justice Powell correctly realized the evolving nature of the concept and the importance of qualitative assessment. In the 1950s and 1960s, “diversity meant students from California, New York, and Massachusetts; city dwellers and farm boys; violinists, painters[,] and football players; biologists, historians[,] and classicists; potential stockbrokers, academics[,] and politicians.” In the 1970s, it expanded to include “students from disadvantaged economic, racial[,] and ethnic groups.” Thus, the first step in advancing diversity cannot be simply drawing circles around the diverse groups du jour, but it must be to acknowledge the intrinsic value of diversity.

## **How and why the United States leads the diversity movement**

The push for diversity cannot be understood without proper historical context. From the Seneca Falls convention in 1848, which demanded the right to vote for women, to the US Civil War, which freed the masses of enslaved people in the United States, the journey to today’s multicultural society has been resisted (and continues to be resisted by certain population segments) at every turn. It was only in 1964, a full century after the Civil War, that the United States passed the US Civil Rights Act and moved from outlawing slavery to the foundation for outlawing discrimination.

Given this history of discrimination in the workplace, it should not be surprising that early diversity programs were largely comprised of window-dressing and buzzword diversity. Often, the first step for a corporation was simply to draft a generalized, amorphous pro-diversity statement. It could be tucked into the corporate bylaws and dusted off in defense of any discrimination lawsuit. A litany of lawsuits filed with the Equal Employment Opportunity Commission (EEOC) during the 1960s and 1970s resulted in the EEOC often directly ordering companies to engage in diversity training. Thus, the compliance era of diversity was born.

Companies proceeded largely to use diversity as a shield to legal problems up until the 1987

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publication of *Workforce 2000: Work and Workers for the 21st Century* by William B. Johnstone, et al. Interestingly, the paper stressed:

At the same time that it is implementing a program to reduce illegal immigration, the nation should begin a program of gradually increasing its quotas for legal immigrants, opening its doors to more individuals desiring to enter the country. Beyond the apparent economic gains that such higher quotas will bring, immigration will provide important intangible benefits: entrepreneurial vitality, a more diverse national culture, a stronger sense of identification, and shared opportunities among the United States and countries from which immigrants come.

Thus, diversity began to be identified as a business imperative.

The 1990s saw a progression into so-called “sensitivity training.” This was largely an attempt to illuminate unconscious bias to the conscious mind. In 1997, Richard W. Judy and Carol D’Amico published the sequel to *Workforce 2000*, appropriately titled *Workforce 2020: Work and Workers in the 21st Century* (Hudson Institute 1997). It rebutted some of the points made in the initial study. Principally, “[w]hat new workers principally need — whether they are white and male or female and minority — are the skills that education must provide, not managers trained in diversity and sensitivity.” Yet, it could not deny the continued gender and ethnic diversification of the workforce. Job training and education needed to be continued priorities for all citizens.

Twenty-one years after *Workforce 2020* there have been countless studies concluding that tangible diversity efforts equate to sustained economic success. The bottom line remained: To bring real change to the corporate boardroom and law firms, diversity had to be directly correlated with profit. As early as 2009, there was direct quantitative evidence of just that. Diversified board rooms prevent groupthink. Further, racially diverse boards more effectively stimulate innovation while adjusting to changing market climates. As evidence of this, a 2011 study noted that company boards comprised of three or more women outperform all male boards by 60 percent on return on investment, 60 percent in return on equity, and 84 percent in return on sales. Even with clear evidence of the myriad advantages diversity offers, in-house legal departments and law firms have largely lagged behind.

## **THE HP MODEL**

On February 8, 2017, the general counsel of HP issued a “Diversity Mandate to Partner Law Firms.” It gave firms express directives, and if they did not achieve them, the company could hold back up to 10 percent of legal fees for that billable year.

## **THE FACEBOOK MODEL**

In 2017, Facebook implemented a new diversity policy, including the application of metrics to outside counsel. Law firms handling Facebook matters had to staff teams comprised of at least 33 percent diverse attorneys. It also urged firms to consider diverse attorneys for firm leadership positions.

## **THE MICROSOFT MODEL**

Microsoft began its Law Firm Diversity Program in 2008. Microsoft pays an annual bonus of up to two percent of total fees to its outside counsel based on meeting specific diversity targets, especially for adding diverse attorneys to firm leadership ranks.

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## THE AT&T MODEL

AT&T has a Preferred Counsel Program. These firms are held to certain diversity commitments and have their diversity data tracked by the company.

### **Diversity matters to the success of in-house legal departments**

The first step in creating a sustainable diversity program is to gain the buy-in of your company and of the leading legal officers of your company. As stated earlier, most large corporations have had some type of diversity initiative in place for decades. Therefore, the legal department should leverage this knowledge by starting its own diversity initiative. Many companies even have chief diversity officers with board-level access, who are invaluable resources.

However, it's not enough to state a desire to start an in-house legal diversity program. To function, it must have a set of achievable and trackable goals. In that vein, Matt Lepore, then-general counsel of BASF Corp. and now global legal head, sent a directive to his team asking for the creation of a legal diversity committee. Sneha Desai, associate general counsel for litigation, chaired the new legal diversity committee, which has four sub-committees. Each of the four sub-committees had a commitment to a certain diversity niche: (1) training and education initiatives, (2) internal recruitment and retention, (3) outside counsel partnerships, and (4) work with external organizations.

The question then becomes how to staff these committees. Naturally, a group of dedicated volunteers, representing a broad societal spectrum would be ideal. But, ultimately, it is essential that the legal department staff it with members of all genders, ethnicities, sexual orientations, and disabilities, including straight white men.

Engaging the “majority” is critical for several reasons. One, it's much simpler to paddle the canoe when all inhabitants are rowing in the same direction and rowing with the same vigor. The law firm of Weil Gotshal & Manges understood this when it created the [Upstander Initiative](#) in 2015. It defined “Upstanders” as “allies, supporters, and advocates for people and communities that share a different background or identity than one's own.” It asks Upstanders to educate and place themselves in the position of their diverse coworkers by, for example, (1) attending a minority bar event, (2) planning a diversity event, or (3) attending at least three diversity training events per year. This exemplifies why diversity initiatives often walk hand-in-hand with inclusiveness programs. The inclusiveness program is the forum by which diversity is cultivated throughout the organization. Even if white males are still overrepresented in certain legal leadership roles, they too can be the change makers for diversity and inclusion efforts. Their inclusion on diversity committees not only includes the attention of all necessary parties, but may also enlighten them to aspects of diversity that they have yet to ponder. These efforts could be coupled with valuable new training programs in the field of unconscious bias, among others.

With the buy-in of your company, your general counsel, your employees and the creation of your diversity committee, you can now go about shaping the goals for your group.

### **Ten steps to create and advance diversity in your in-house legal department**

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- Gain buy-in of corporate leadership
  - Gain buy-in of in-house legal leadership
  - Consult with current corporate diversity program leadership — if one exists
  - Establish in-house legal diversity committee
  - Draft short-term and long-term goals for legal diversity committee
  - Sign-on to ABA Resolution 113 and/or related initiatives
  - Incorporate diversity imperative into outside counsel guidelines
  - Create appropriate diversity metrics to track internal progress and progress of outside vendors
  - Partner with external diversity organizations and community inclusion initiatives
  - Track year-over-year progress and communicate the same to vendors

## **Making the most out of metrics: ABA Resolution 113 Survey**

A starting point for drafting your legal diversity committee's goals could be ABA Resolution 113. Near the end of 2016, the BASF in-house legal department signaled its dedication to diversity by signing onto ABA Resolution 113, and it encourages other corporations to do the same. As adopted by the American Bar Association, it resolves in part:

- “That the American Bar Association urges all providers of legal services, including law firms and corporations, to expand and create opportunities at all levels of responsibility for diverse attorneys”; and,
- “That the American Bar Association urges clients to assist in the facilitation of opportunities for diverse attorneys, and to direct a greater percentage of legal services they purchase, both currently and in the future to diverse attorneys[.]”

As part of this Resolution, the ABA also urges circulation of its *Model Diversity Survey* to each company's key outside counsel law firms. BASF did this in early 2017 and received results from all of its firms by the end of the second quarter of 2017.\* While merely obtaining this data gives a company some eye-opening insight into the makeup of its outside counsel, mere data collection does nothing to further the cause for diversity. Consequently, corporate legal departments have derived numerous ways to use the data to drive change in overall law firm culture.

\* BASF encourages other firms and companies to sign onto this resolution. Please email [resolution113@americanbar.org](mailto:resolution113@americanbar.org) for information about joining the resolution.

## **Partnering with outside counsel**

As law firm clients both acknowledge the intrinsic value of diversity and benefit from the bottom line rewards of it, law firms must adapt to this model. Candidly, the monetary benefits of diversity are also visible in the law firm context. In fact, a law firm ranked in the top quartile in diversity “will generate more than US\$100,000 of additional profit per partner than a peer firm of the same size in the same city, with the same hours and leverage but a diversity ranking in the bottom quarter of firms.” There are probably multiple reasons for this financial success, one being that clients like BASF are now demanding more diverse teams offered by more diverse firms. There is no one-size-fits-all outside counsel program for diversity. However, please see the sidebar above for a few examples of innovative programs by Fortune 500 corporations.

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## Gaining acknowledgement

Numerous organizations also acknowledge efforts in diversity. Such acknowledgements only serve to brighten the reputation of a company and permit them access into the pipeline of diverse legal talent. For instance, in April 2017, the New Jersey Law Journal acknowledged BASF's ongoing diversity momentum by naming BASF as Outstanding In-House Law Department of the Year in the area of diversity. BASF Corp.'s general counsel also received the General Counsel Impact Award. The basis for these awards and for the overall success of the department is that the far majority of BASF's legal leadership team is comprised of lawyers from diverse backgrounds with several holding key company-wide leadership roles.

## The BASF model — a multi-faceted approach

As the few referenced examples illustrate, there are numerous companies providing forwarding-thinking and innovative approaches to diversity. BASF developed an approach that encompasses many of the same concepts and fits it into the relationships it cultivates with outside firms. Perhaps this approach can benefit other law departments.

The BASF Legal Diversity Outside Counsel Partnership subcommittee set out to draft a brand-new BASF Legal Outside Counsel Diversity Program. BASF partnered with its law firms to enact sustained change in the composition of the law firms and the way its law firms assign work. BASF circulated its program to all outside counsel in the third quarter of 2017. It included (1) new firm-wide diversity goals BASF had for its outside counsel; (2) new BASF matter team staffing diversity goals; (3) new diversity requirements of outside counsel on BASF matters; and (4) the implementation of a Diversity Snapshot tool. To implement this program, BASF knew it would need to greenlight certain risks. It encouraged the use of more junior attorneys on significant matters to develop their legal acumen. This is the only way to develop young diverse attorneys and expose them to the skills necessary to become part of the firm talent pipeline. It also gives them the confidence to know that they can and will be promoted within the firm structure — if that is their goal.

Significantly, BASF's New Outside Counsel Diversity Program required that all RFP and AFA proposals include staffing models for attorneys of diverse backgrounds. It also requires each firm to participate in the Mansfield Rule initiative. [The Mansfield Rule](#), a concept developed in 2016, requires law firms and companies to consider women and attorneys of color as at least 30 percent of the candidate pool for promotion and leadership positions. It is an offshoot of the National Football League's Rooney Rule and named after [Arabella Mansfield](#), the first woman admitted to practice law in the United States — in 1869. Each BASF firm now is required to become Mansfield Certified within three years.

Lastly, the Diversity Snapshot is the culmination of BASF's digestion of its firms' results from the *ABA Model Diversity Survey*. It provides a quantitative progress report of how the firms are proceeding to meet the BASF's legal team's diversity goals. This will be updated year-over-year — with the hopes of tracking significant progress in firm-wide and BASF-specific matter diversity.

As currently calculated (subject to change by yearly reevaluation), the Legal Diversity Factor Score (LDFS) reflected on the Diversity Snapshot has a maximum possible score of 100. The firm receives

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10 points if its BASF relationship partner has a diverse background. Participation by diverse attorneys in firm-wide leadership committees can earn up to 30 points. Firms can earn up to 30 points based on firm-wide composition of diverse legal professionals. Lastly, firms can earn up to 30 points for the makeup of teams performing BASF-specific work. In its first year, BASF evaluated 26 firms with LDFS varying from 22 to 84, with most falling in the 40 to 60 range.

BASF Corp.'s then-General Counsel Matt Lepore communicated the results to the firms in December 2017. According to Lepore, BASF "will not use this first score as the basis for immediate decision-making, [but it] expect[s] the firms will work to improve their score year-over-year, and we will absolutely be using the BASF Legal Diversity Factor Score as a means to differentiate our firms each year going forward." In short, BASF's law department will use the power of the purse, if necessary, to ensure a break from the mere incremental change in law firm culture.

In 2018, BASF held face-to-face evaluation meetings with each of its key firms. One of the main discussion points in these meetings is an evaluation of the firm's 2017 BASF LDFS and the firm's plan to improve this score in 2018. In the second quarter of 2018, BASF once again circulated the ABA Model Diversity Survey. It now has received the new results and is calculating a new LDFS. This new score will aim to include points for year-over-year change as well as points for less tangible diversity progress, such as commitments to diversity pro bono programs, trade organizations, recruitment efforts, retention efforts, etc.

## **Partnering with outside organizations**

To be truly successful, the in-house legal programs must matriculate to the outer community. There are a number of terrific organizations operating in this space. BASF chose to partner with the Leadership Counsel on Legal Diversity (LCLD), an organization that promotes diversity at all stages and tiers of legal professionalism. BASF partnered with the LCLD and one of its outside counsel law firms to launch a BASF Legal Summer Internship Program, with one dedicated spot per year for a first-year LCLD scholar. This LCLD scholar is able to split time working on location at the law firm in New York City and at BASF's North American headquarters in Florham Park, NJ. He or she is given the opportunity to work on BASF-specific legal matters, attend BASF legal hearings, participate in BASF business meetings and briefings, and to shadow BASF legal employees. The program is designed to give first-year law students unique insights into the in-house legal department, ones not often gained from years of law firm work. LCLD, however, offers programs for all experience levels, including an [LCLD Fellows Program](#). This is for more seasoned lawyers who are looking to lead the upper echelons of legal enterprises.

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## **Conclusion**

In-house legal departments not only look to increase diversity within their own legal departments and within the company but to begin a cascade of knowledge and inclusion that will run to the law firms it retains, its employees, its other clients, and hopefully to the culture at large. Such devotion to diversity requires the dedication of significant monetary, personnel, and time resources. And, to be successful, the dedication must be consistent and continual. But, few can argue that the short-term and long-term benefits far outweigh this spend.

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Success of such programs also requires the existence of willing partners. Fortunately, law firms are embracing these initiatives and realizing how partnering with their clients can create symbiotic value. Thus, in-house legal departments can now hope that these series of movements toward diversity have begun to establish momentum in their outside counsel and in the legal culture in general.

## Further Reading

*Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

*Id.* at 322.

Rohini Anand & Mary-Frances-Winters, *A Retrospective View of Corporate Diversity Training from 1964 to the Present*, *Academy of Management Learning & Education*, Vol. 7, No. 3, 356, 357 (2008).

*Id.* at 112.

*Id.* at 25.

Lawrence J. Trautman, *Corporate Boardroom Diversity: Why are We Still Talking About This?*, 17 *SCHOLAR* 219, 222 (2015).

*Id.* at 224.

Sheryl L. Axelrod, *The Dollars and Sense of Diversity*, 34 *PENNSYLVANIA LAWYER* 19, 20 (Jul./Aug. 2012).

See generally Avivah Wittenberg-Cox, *Corporate Diversity Initiatives Should Include White Men*, *HARVARD BUSINESS REVIEW* (Sept. 6, 2016).

See Kathleen Nalty, *Practical Steps for Engaging White Men in Diversity and Inclusiveness Efforts*, at 15 *NATIONAL ASSOCIATION OF LAW PLACEMENT*, *NALP Bulletin* (Sept. 2010).

See generally, Douglas E. Brayley & Eric S. Nguyen, *Good Business: A Market-Based Argument for Law Firm Diversity*, 34 *J. LEGAL. PROF.* 1 (2009).

*Id.* at 24.

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